

Introduced by Senator Murray

February 19, 2004

An act to add Chapter 32 (commencing with Section 22947) to Division 8 of the Business and Professions Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 1436, as introduced, Murray. Computer spyware.

Existing law provides for the regulation of various businesses by the Department of Consumer Affairs. No provision of existing law provides for the regulation of computer spyware.

This bill would require a person or entity providing computer software containing spyware, as defined, to a computer in California to disclose to the recipient that the software contains spyware and what the spyware does. The bill would authorize the recipient of computer spyware transmitted in violation of the prohibitions, the Internet service provider, or the Attorney General to bring an action to recover actual damages. The bill would authorize these parties to recover liquidated damages of \$1,000 per transmission, subject to reduction by a court for specified reasons. The bill would provide for an award of reasonable attorney's fees and costs to a prevailing plaintiff.

This bill would prohibit the transmission to a computer in California of software containing spyware in violation of the policy of the recipient's Internet service provider. The bill would authorize a provider whose policy is violated to bring a civil action to recover specified damages. The bill would prohibit a provider from bringing an action under both this provision and other provisions being added by the bill for the same transmission of software containing spyware.

This bill would provide that if any part of these provisions or their applications are held invalid, the invalidity would not affect other provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Chapter 32 (commencing with Section 22947) is added to Division 8 of the Business and Professions Code, to read:

CHAPTER 32. CONSUMER PROTECTION AGAINST COMPUTER
SPYWARE ACT

22947. This chapter shall be known as and may be cited as the Consumer Protection Against Computer Spyware Act.

22947.1. For purposes of this chapter, “spyware” means an executable program that automatically and without the control of a computer user gathers and transmits to the provider of the program or to a third party either of the following types of information:

(a) Personal information or data of a user.

(b) Data regarding computer usage, including, but not limited to, which Internet sites are or have been visited by a user.

22947.2. (a) A person or entity that provides computer software containing spyware to a computer in California shall disclose the following information to the recipient of the software:

(1) That the software contains spyware.

(2) What the spyware does.

(b) The statement required by subdivision (a) shall be in at least 18-point type and shall be included in the first appearing of the following:

(1) The software’s opening download.

(2) The Web site of the provider or of the software.

(3) The initial installation screen for the software.

22947.3. (a) (1) In addition to any other remedies provided by this chapter or by any other provision of law, a person who receives computer software containing spyware in violation of Section 22947.2, an Internet service provider, or the Attorney

General may bring an action against the violator to recover either or both of the following:

(A) Actual damages.

(B) Liquidated damages of one thousand dollars (\$1,000) for each instance of software containing spyware provided in violation of Section 22947.2.

(2) The recipient, an Internet service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(3) There shall not be a cause of action against an Internet service provider that is only involved in the routine transmission of the software containing spyware over its computer network.

(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively distribute the statement required by Section 22947.2, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each provision of software containing spyware.

22947.4. (a) A person or entity may not transmit computer software containing spyware to a computer in California in violation of the policy of the recipient's Internet service provider.

(b) (1) In addition to any other action available under law, an Internet service provider whose policy on computer spyware transmission is violated may bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of fifty dollars (\$50) for each transmission of software containing spyware in violation of this section, up to a maximum of twenty-five thousand dollars (\$25,000) per day, whichever amount is greater.

(2) In any action brought pursuant to paragraph (1), the court may award reasonable attorney's fees to a prevailing party.

(3) In any action brought pursuant to paragraph (1), the Internet service provider shall be required to establish as an element of its cause of action that, prior to the alleged violation, the defendant had actual notice of both of the following:

(A) The Internet service provider's policy on the transmission of software containing spyware.

(B) The fact that the defendant's transmission of software containing spyware would use or cause to be used the Internet service provider's equipment.

1 (4) (A) An Internet service provider who has brought an action
2 against a party under Section 22947.3 may not bring an action
3 against that party under this section for the same transmission of
4 software containing spyware.

5 (B) An Internet service provider who has brought an action
6 against a party for a violation of this section may not bring an
7 action against that party under Section 22947.3 for the same
8 transmission of software containing spyware.

9 22947.9. The provisions of this chapter are severable. If any
10 provision of this chapter or its application is held invalid, that
11 invalidity shall not affect any other provision or application that
12 can be given effect without the invalid provision or application.

